REMARKS

Receipt of the Office Action of April 7, 2010 is gratefully acknowledged.

Claims 8 - 11, 13 and 14 have been reexamined and finally rejected as follows: (1) under 35 USC 101 because the claimed process "...is not required to be implemented by a particular machine, and does not transform a particular article;" (2) under 35 USC 112, second paragraph because the limitation "determining the averaging of n filling instances" is not clear; and (3) under 35 USC 103(a) as unpatentable over the AAPA.

These rejections have been carefully considered and are as a result respectrfully traversed.

(1)

The rejection under 35 USC 101 appears to be a "Bilski rejection." The case of ***Bilski v. Kappos,*** which was decided on June 28, 2010 by the Supreme Court does not support this rejection. The Court stated very clearly, that the "machine or transformation" test is not the only test for determining patentability for a business method claim. Here the claims are not to a business method and the machine or transformation test has no place where the method involves a control of a filling unit (structure). The machine, if we must have one, is the filling unit, and the transformation, if we must have one, is the signal changes. In fact, neither is needed, specifically defined steps are recited which produce a useful result in effecting the noted control. Nothing more is needed to satisfy the requirements of 35 USC 101. Lest we forget, the Supreme Court has instructed us in ***Diamond v. Chakrabarty***, 447 U.S. 303 (Sup. Ct. 1980) that it "...is improper to read into § 101 limitations as to the subject matter that may be patented where the legislative history does not indicate that Congress clearly intended such limitations." Where has Congress mandated the machine or transformation test that the examiner is applying here? It does not exist. The USPTO is merely extrapolating from their dealings with business method claims, and here, as

noted above we do not have business method claims.

This rejection should be withdrawn.

(2)

It is not apparent to applicant why the clause "determining the averaging of n filling instances" is not clear. According to this clause, when n fillings are recorded, one simply Averages them. It does not mean anything more complicated than that.

This rejection should also be withdrawn.

(3)

In applying 35 USC 103(a) the examiner, it is respectfully submitted is stretching 35 USC 103 beyond its intended limits. The examiner suggests that "...one of ordinary skill in the art would know that the number of filling instances averaged to determine an after run value could be advantageously varied inn response to filling conditions." Why would one know that apart from the teachings of the present application? It is not in the AAPA. The examination process must show what the level of skill is that supports the assertion. See, ***In re Kaplan***, 229 USPQ 678 (Fed. Cir. 1986). The level of skill is to be asserted as a factual finding not an assertion. That is lacking here.

This rejection should also be withdran.

In view of the foregoing, reconsideration is respectfully requested and the noted rejections withdrawn with claims 8 - 11, 13 and 14 allowed.

Respectfully submitted,

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